

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



**Docket**  
**No. 74-1419**

B  
P/S

**IN THE**  
**United States Court of Appeals**  
**For the Second Circuit**

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—vs—

ROBERT LEE DENSON,

*Defendant-Appellant.*

**On appeal from the United States District Court**  
**Northern District of New York**

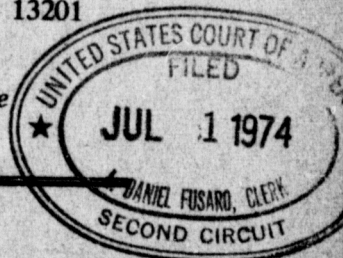
**BRIEF FOR APPELLEE,**  
**UNITED STATES OF AMERICA**

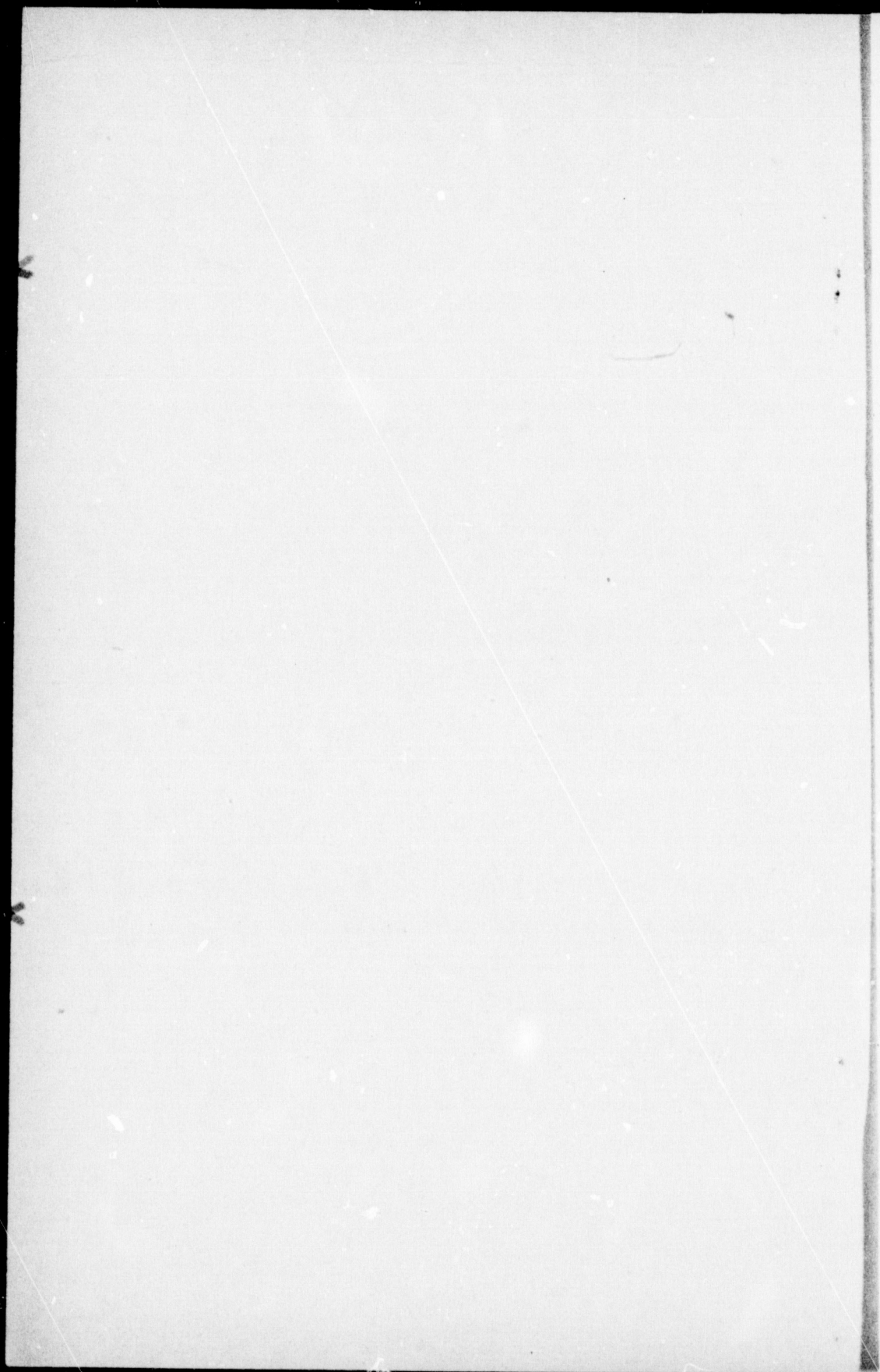
JAMES M. SULLIVAN, JR.  
United States Attorney  
Northern District of New York

EUGENE WELCH  
Assistant United States Attorney  
Federal Building  
Syracuse, New York 13201  
(315) 473-6660

*Attorneys for Appellee*

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.  
(6632)





## TABLE OF CONTENTS

	Page
Table of Authorities .....	i
Statement of Issues .....	1
Statement of the Case .....	1
<b>ARGUMENT:</b>	
POINT I — The jury verdict was not against the weight of the evidence .....	2
POINT II — It was not error to deny defendant's pro- posed instruction .....	5
Conclusion .....	8

### Table of Authorities Cited:

#### Cases:

<i>Glasser v. United States</i> , 315 U.S. 60 (1942) .....	2
<i>Hoffa v. United States</i> , 385 U.S. 293 (1966) .....	3
<i>Macklin v. United States</i> , 409 F.2d 174 (D.C. Cir. 1969) ...	6
<i>United States v. Agueci</i> , 310 F.2d 817 (2d Cir. 1962), <i>cert.</i> <i>denied</i> , 372 U.S. 959 (1963) .....	5
<i>United States v. Amaral</i> , 488 F.2d 1148 (9th Cir. 1973) ....	8
<i>United States v. Barash</i> , 412 F.2d 26 (2d Cir. 1969), <i>cert.</i> <i>denied</i> , 434 U.S. 958 (1971) .....	6
<i>United States v. Barber</i> , 442 F.2d 517 (3rd Cir. 1971), <i>cert.</i> <i>denied</i> , 404, 958 (1971) .....	7
<i>United States v. Candella</i> , 487 F.2d 1223 (2d Cir. 1973), <i>cert. denied</i> , _____ U.S. _____, 94 S.Ct. 1563 (1974) .....	2
<i>United States v. Countryman</i> , 311 F.2d 189 (2d Cir. 1962) .	3
<i>United States v. Dehar</i> , 388 F.2d 430 (2d Cir. 1968) .....	3
<i>United States v. Eustace</i> , 423 F.2d 569 (2d Cir. 1970) .....	5

	Page
<i>United States v. Evans</i> , 484 F.2d 1178 (2d Cir. 1973) . . . . .	7
<i>United States v. Famulari</i> , 447 F.2d 1377 (2d Cir. 1971) . . .	6
<i>United States v. Fay</i> , 394 F.2d 109 (2d Cir. 1968) . . . . .	3
<i>United States v. Fernandez (I)</i> , 456 F.2d 638 (2d Cir. 1972) .	6
<i>United States v. Johnson</i> , 401 F.2d 746 (2d Cir. 1968) . . . . .	6
<i>United States v. Leach</i> , 427 F.2d 1107 (1st Cir. 1970), <i>cert.</i> <i>denied</i> , 400 U.S. 829 (1970) . . . . .	6
<i>United States v. Scarpellino</i> , 431 F.2d 475 (8th Cir. 1970) . .	2
<i>United States v. Telfaire</i> , 469 F.2d 552 (D.C. Cir. 1972) . . .	6
<i>United States v. Williams</i> , 470 F.2d 915 (2d Cir. 1972) . . . .	3
 <b>Statutes:</b>	
Fed. Rules Cr. Proc., Rule 30, 18 U.S.C.A. . . . .	5
Fed. Rules Cr. Proc., Rule 52(b), 18 U.S.C.A. . . . .	6

**IN THE  
United States Court of Appeals  
For the Second Circuit**

---

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—vs—

ROBERT LEE DENSON,

*Defendant-Appellant.*

---

**On appeal from the United States District Court  
Northern District of New York**

---

**BRIEF FOR APPELLEE,  
UNITED STATES OF AMERICA**

---

**STATEMENT OF ISSUES**

I. Whether the jury verdict was against the weight of the evidence.

II. Whether the trial court erred in failing to give defendant's proposed instruction on identification.

**STATEMENT OF THE CASE**

The government submits that in view of the issues raised in this appeal there is no need for any further statement of the case beyond what is set forth in appellant Denson's brief and in the discussions of the sufficiency of the evidence in his and the government's briefs.

**ARGUMENT****POINT I****THE JURY VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.**

Defendant-appellant Denson asserts that the government failed to sustain its burden of establishing the defendant's guilt beyond a reasonable doubt. However, reviewing the evidence presented in the light most favorable to the government, it is clear that the verdict of the jury was supported by substantial evidence. See *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Candella*, 487 F.2d 1223, 1228 (2d Cir. 1973), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 94 S.Ct. 1563 (1974).

The most significant portion of that evidence was the identification testimony of Alton Isaac. Denson contends that this testimony was inconsistent and flawed in view of prior, allegedly contradictory statements made by the witness and the contradictory testimony of the two confessed bank robbers.

It is submitted that Isaac's testimony was not inconsistent or flawed in any significant respect. Isaac identified the defendant as one of the bank robbers both before trial from photographs (A 65)\* and in court (A 60). There was a substantial basis for that identification. Isaac testified that he spoke with and observed the unmasked defendant from as close a distance as three feet (A 55) for from four to five minutes outside the bank just prior to the occurrence of the robbery (A 54). This provided him with ample opportunity to view the defendant. See *United States v. Scarpellino*, 431 F.2d 475, 477 (8th Cir. 1970). In addition, the witness recalled having observed the defendant on a prior occasion playing basketball in a public park (A 56).

The testimony of Isaac was contradicted by the surprise testimony of confessed bank robbers Broadwater and Jones that the defendant had not taken part in the bank robbery (A 123, 164). However, their testimony on this point was impeached by the testimony of police officer Sardino to the effect that Jones

---

\* page references are to the original record transcript pages.

had implicated the defendant in the bank robbery during questioning by police two days after the occurrence of the robbery (A 246). The testimony of Broadwater and Jones to the effect that they had not encountered the defendant at all on the day of the robbery (A 127, 165) was impeached by the testimony of police officer Walsh as to a prior inconsistent statement made by Jones (A 255-56), and contradicted by the testimony of witnesses Breland (A 194-95), Houston (A 203), Armster (A 215-16) and Bolden (A 279) that defendant was in the company of one or both of the confessed bank robbers both before and after the robbery occurred.

Thus, it is submitted that the testimony of Alton Isaac, identifying the defendant as one of the bank robbers, was inherently credible and that the inconsistencies and contradictions alleged by the defendant-appellant did not affect the material portions of that testimony. At best those allegations, shown to be baseless, served to strengthen the credibility of Isaac's testimony. At the least they rendered that credibility a question of fact to be resolved by the jury in light of his testimony both on direct and cross-examination. *Hoffa v. United States*, 385 U.S. 293, 311 (1966); *United States v. Williams*, 470 F.2d 915, 917 (2d Cir. 1972). The jury having found the defendant guilty, that testimony must be assumed to have been credible.

In addition to the identification testimony of Isaac, the government offered the testimony of several other witnesses which served to prove further that the defendant had taken part in the robbery. The defendant attempted to impeach these witnesses by highlighting alleged inconsistencies in their testimony or the circumstances surrounding their testimony. However, since such matters reflected on the witnesses' credibility, they were issues of fact for the jury to resolve, *United States v. Fay*, 394 F.2d 109, 110 (2d Cir. 1968); *United States v. Countryman*, 311 F.2d 189, 191 (2d Cir. 1962). As the jury here found the defendant guilty, this testimony must be viewed in the light most favorable to the government. *United States v. Dehar*, 388 F.2d 430, 433 (2d Cir. 1968).

The testimony of Rosa Lee Armster and Dora Mae Bolden placed the defendant in the company of confessed bank robber Jones on the morning of the robbery (A 215, 279).

Three witnesses testified that the defendant was with Broadwater and Jones shortly after the robbery took place (Henry Breland, A 194-95; Jeffrey Houston, A 203; Rosa Lee Armster, A 216).

Bank surveillance photos were introduced into evidence showing the robber who was not Jones or Broadwater wearing a light colored cap and white high-top sneakers, similar to those worn by Denson on the day of his arrest and transportation to the Magistrate by Agent Savage (A 148-49).

Finally, evidence was introduced that defendant spent large sums of money in the eight days following the robbery. Douglas Bullock testified that the defendant paid him \$2,000 in cash for a car approximately three hours after the robbery had occurred (A 143). Randall Walker testified that \$306 had been paid in cash for clothes purchased from his clothing store in Detroit, Michigan, two days after the robbery had occurred (A 289). The sales slip, government's Exhibit 11 in evidence, showing the \$306 cash transaction was recovered from the personal possessions of the defendant Denson, by the FBI agent who transported Denson to the Magistrate on the day of his arrest, leading to the logical inference that Denson had made the \$306 cash expenditure shortly after the robbery (A 150, 158, 285, 289). The defendant Denson agreed to the stipulation that he paid \$220 in cash for traffic fines eight days after the robbery had occurred (A 156-57).

The defendant offered only the inconsequential testimony of two witnesses. Paul Weatherup testified to a prior erroneous description of the defendant (A 184) and police officer Mrozienski testified that he was present when the police interrogated Jones two days after the bank robbery occurred, that he knew that Jones had made a statement implicating the defendant, but that he had neither made a record of the statement nor reported the statement to anyone (A 297-98).

Based on this evidence, the jury returned a verdict finding the defendant guilty beyond a reasonable doubt. It is submitted that that verdict was adequately supported by the identification testimony of Alton Isaac plus the strong circumstantial evidence placing the defendant in the company of the confessed bank robbers before and after the robbery and demonstrating his possession of at least \$2,500 in cash in the eight days immediately following the occurrence of the robbery. See, e.g., *United States v. Eustace*, 423 F.2d 569, 570-71 (2d Cir. 1970). As the verdict was supported by substantial evidence, the government need not exclude every remote possibility of innocence to establish guilt beyond a reasonable doubt. *United States v. Agueci*, 310 F.2d 817, 830 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Therefore, it is respectfully submitted that the government presented evidence sufficient to sustain its burden of proof.

## POINT II

### IT WAS NOT ERROR TO DENY DEFENDANT'S PROPOSED INSTRUCTION.

Rule 30 of the Federal Rules of Criminal Procedure states in part:

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . .

It is submitted that defendant Denson did not satisfactorily comply with the requirements of Rule 30 by making a timely objection to the omission of his proposed instruction and that, therefore, the question of the omission may not be considered on appeal. Denson's proposed instruction on identification (A 361) was submitted to the trial judge as per the judge's request (A 14-15). However, Denson made no objection either at the time the trial judge denied the proposed instruction (A 274) or at any other time prior to the jury's retiring to consider its verdict. Furthermore, at the close of the trial judge's charge, and at

Denson's specific request (A 403), the trial judge offered the jury supplemental instructions on the issue of identification (A 404). Denson's counsel then declared himself satisfied with the trial judge's instructions, stating

I have no other exceptions to the Charge and no other requests. (A 405)

Where a defendant's requested instruction is denied, the defendant must comply with the requirements of Federal Rule of Criminal Procedure 30 to preserve the right to appeal. *United States v. Leach*, 427 F.2d 1107, 1113 (1st Cir. 1970), *cert. denied*, 400 U.S. 829 (1970); see also *United States v. Barash*, 412 F.2d 26, 33 (2d Cir. 1969), *cert. denied*, 396 U.S. 832 (1969); *United States v. Johnson*, 401 F.2d 746, 747 (2d Cir. 1968). Where the objection required by Rule 30 has not adequately been raised, as here, review of a trial judge's denial of a proposed instruction is precluded unless the denial constitutes plain error under Federal Rule of Criminal Procedure 52(b). See *United States v. Famulari*, 447 F.2d 1377, 1382 (2d Cir. 1971). For the reasons discussed below it is clear that denial of the proposed instruction in this case did not constitute plain error.

Whether or not the failure of a trial judge to give a requested instruction constitutes error depends upon the particular circumstances of each case. *United States v. Fernandez (I)*, 456 F.2d 638, 644 (2d Cir. 1972). See also *United States v. Telfaire*, 469 F.2d 552, 556 (D.C. Cir. 1972); *Macklin v. United States*, 409 F.2d 174, 177 (D.C. Cir. 1969). Thus, where there was afforded a full opportunity to develop all the facts relevant to identification of the defendant, and where there were careful and accurate instructions to the jury, it was not error for the trial judge to refuse to give an additional charge regarding identification. *United States v. Evans*, 484 F.2d 1178, 1188 (2d Cir. 1973).

It is submitted that the defendant was afforded ample opportunity to develop the relevant facts on the issue of identification and that the instructions of the trial judge on that issue were "careful and accurate". The identification testimony in question was that of Alton Isaac. Defense counsel cross-examined Isaac at length as to the basis for and circumstances

surrounding his identification of the defendant as one of the bank robbers (A 70-112, 116-117). Defense counsel also recalled portions of Isaac's testimony for the jury at several points in the course of his summation (A 315-17, 322-23, 326). Therefore, based on defense counsel's cross-examination of the witness and summation alone, the jury was adequately apprised of the factual issues surrounding Isaac's identification of the defendant as one of the bank robbers.

If more was required, however, Judge MacMahon's identification charge to the jury sufficed (A 391-92, 397-400, 403-05). Judge MacMahon was careful to point out possible factors which might detract from the reliability of Isaac's identification (A 398-400), and at the close of his instructions, at the urging of defense counsel (A 403-04) he recalled for the jury a prior description of the defendant by Isaac which allegedly conflicted with the defendant's actual appearance in court (A 404).

Denson asserts that a proposed instruction (A 361-62) adapted from *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), *cert. denied*, 404 U.S. 958 (1971), should have been given in addition to the instruction given by the court on identification and that the failure to do so was reversible error. A similar contention was made and rejected in *United States v. Evans*, *supra*, 484 F.2d 1178, 1187-88 (2d Cir. 1973), even though, unlike the case at bar, no specific charge on identification was given and the instruction was limited to a general charge on the issue of credibility. It is clear, then, that under *Evans*, it was not reversible error for the trial judge to refuse to give a proposed *Barber* instruction, particularly where the actual instruction given by the court on the issue of identification was careful, fair, and accurate. See also *United States v. Amaral*, 488 F.2d 1148, 1151 (9th Cir. 1973) (decision of the Second Circuit in *Evans* endorsed by the Ninth Circuit).

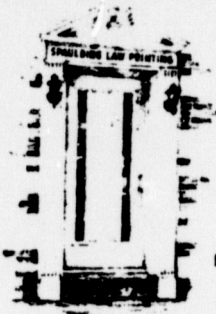
**CONCLUSION**

**APPELLEE RESPECTFULLY REQUESTS THAT THE  
VERDICT AND JUDGMENT OF THE TRIAL COURT  
BE AFFIRMED.**

Respectfully submitted,

JAMES M. SULLIVAN, JR.  
United States Attorney  
Northern District of New York  
Federal Building  
Syracuse, New York 13201  
(315) 473-6660

EUGENE WELCH  
Assistant United States Attorney  
Northern District of New York  
*Of Counsel*



Records and Briefs for State and Federal Courts

# SPAULDING LAW PRINTING CO.

ESTABLISHED  
1881

313 MONTGOMERY STREET • SYRACUSE, N.Y. 13202 • PHONE AC 315 HA2-4805

RUSSELL D. HAY, owner

## AFFIDAVIT OF SERVICE

RE: UNITED STATES OF AMERICA v. ROBERT LEE DENSON

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) ss.:  
CITY OF SYRACUSE )

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of JAMES M. SULLIVAN, JR., United States Attorney, Attorney for Appellee, ~~he~~ he personally served three (3) copies of the printed ~~Record~~ <sup>Briefs</sup> ~~Brief~~ and two (2) copies of [Appendix] of the above-entitled case addressed to:

LEE S. MICHAELS, ESQ.  
Michaels and Michaels  
Metcalf Plaza  
Auburn, N. Y. 13021

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on June 27, 1974.

*Everett J. Rea*  
.....  
Everett J. Rea

Sworn to before me this 27th  
day of June , 1974.

*Lucas S. Moloughney*  
.....  
Commissioner of Deeds